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758-051—64

# In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 631

ROBBINS MEN'S & BOYS' WEAR CORP., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The court of appeals did not write an opinion in this case. The opinion of the district court, which was affirmed by the court of appeals, is not reported (Pet. App. A, pp. 1a–5a).

### JURISDICTION

The judgment of the court of appeals was entered on August 6, 1964. The petition for a writ of certiorari was filed on October 27, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the General Services Administration has authority to condemn additional land for a public building site for the purpose of razing the buildings on that land to remove the danger of their collapse caused by the government's construction activities.

## STATUTES INVOLVED

Section 5(a) of the Public Buildings Act of 1959, 73 Stat. 479, provides:

> The Administrator is authorized to acquire, by purchase, condemnation, donation, exchange, or otherwise, such lands or interests in lands as he deems necessary for use as sites, or additions to sites, for public buildings authorized to be constructed or altered under this Act.

Section 7(a) of the Public Buildings Act of 1959, 73 Stat. 480, provides:

> In order to insure the equitable distribution of public buildings throughout the United States with due regard for the comparative urgency of need for such buildings, except as provided in section 4, no appropriation shall be made to construct any public building or to acquire any building to be used as a public building involving an expenditure in excess of $100,000, and no appropriation shall be made to alter any public building involving an expenditure in excess of $200,000, if such construction, alteration, or acquisition has not been approved by resolutions adopted by the Committee on Public Works of the Senate and House of Representatives, respectively, and such approval has not been rescinded as pro-

vided in subsection (c) of this section. For the purpose of securing consideration of such approval the Administrator shall transmit to Congress a prospectus of the proposed project, including (but not limited to)—

(1) a brief description of the building to be constructed, altered, or acquired under this Act;

(2) the location of the project, and an estimate of the maximum cost of the project;

* * * * *

The Independent Offices Appropriation Act of 1962, 75 Stat. 342, 349, provides:

For an additional amount for expenses, not otherwise provided for, necessary to construct public buildings projects and alter public buildings by extension or conversion where the estimated cost for a project is in excess of $200,000 pursuant to the Public Buildings Act of 1959 (73 Stat. 479), including equipment for such buildings, $188,946,500, and not to exceed $500,000 of this amount shall be available to the Administrator for construction of small public buildings outside the District of Columbia as the Administrator approves and deems necessary, all to remain available until expended: *Provided,* That the foregoing amount shall be available for public buildings projects at locations and at maximum construction improvement costs (excluding funds for sites and expenses) as follows:

* * * * *

Customhouse, courthouse, and Federal office building, New York, New York, $59,222,050;

* * * * *

STATEMENT

This condemnation proceeding is for the enlargement of the site for the customs court and federal office building at Foley Square in New York City. Construction of the 41-story building was begun in April 1963. Thereafter, the Government investigated the settlement and lateral movement of adjacent buildings between the building site and Broadway. As construction progressed, instability of some of these buildings, including a 16-story office building at 320 Broadway, became increasingly evident. For this reason, the Administrator of G.S.A. determined to condemn the property between the construction project and Broadway and add it to the site of the customs court and federal building.

A complaint and declaration of taking were filed on April 30, 1964. The district court entered *ex parte* the usual order for immediate possession. From the refusal of the district court to stay its prior order of immediate possession, certain tenants took an appeal. The court of appeals, on June 2, 1964, ordered the district court to hold further hearings on the issue of the necessity for immediate possession. *United States* v. *Certain Land in the Borough of Manhattan (306 Broadway Realty Corp., et al.)*, 332 F. 2d 679 (Pet. App. 6a–11a).

The petitioner (a tenant in one of the buildings) and others, concurrently with the bringing of the first

appeal, raised the issue of the right of the Government to take the property in question. The district court filed an opinion on June 30, 1964, upholding the right of the Government (Pet. App. 1a–5a). On appeal, the decision of the district court was affirmed by the court of appeals *per curiam* on August 6, 1964.

In the meantime, the district court had held hearings on the remand of the first appeal concerning the right of the United States to immediate possession. On August 5 and 6, the district court granted the Government immediate possession of 320 Broadway and possession of all the other property condemned in this proceeding on November 1, 1964. A third appeal was taken from these decisions, and the district court was affirmed *per curiam* on August 14, 1964.

The petitioner was a party only to the litigation concerning the government's right to condemn the property.[1] It seeks review of the decision sustaining this right.

## ARGUMENT

The property involved in the instant case was properly condemned under the authorization granted by Congress to condemn land for the construction of a customs court and federal office building at Foley Square. The statutory authority is found in Section

[1] The petitioner did appeal from an order entered September 15, 1964, granting the government possession pursuant to the district court's decisions of August 5 and 6, 1964. This appeal was dismissed by the court of appeals on October 26, 1964, as frivolous, and on October 30, Mr. Justice Harlan denied an application for a stay of enforcement of the order of possession.

5(a) of the Public Buildings Act of 1959, 73 Stat. 479, 40 U.S.C., Supp. V, 604(a), which declares in the broadest language that "The Administrator [of G.S.A.] is authorized to acquire, by purchase, condemnation, donation, exchange, or otherwise, such lands or interests in lands as he deems necessary for use as sites, or additions to sites, for public buildings authorized to be constructed or altered under this Act." The construction of the building at Foley Square was specifically authorized by Congress by the Independent Offices Appropriation Act of 1962, Act of August 17, 1961, 75 Stat. 342, 349. The Committees on Public Works of the Senate and House of Representatives approved the project prior to the appropriation, pursuant to Section 7 of the Public Buildings Act of 1959, 73 Stat. 480, 40 U.S.C., Supp. V, 606.

No additional authorization was required to condemn additional land when this became necessary in the course of construction of the building at Foley Square. When Congress approves the construction of a public building, it does not approve or specify a metes and bounds description of the site of that building. In this case, Congress merely approved the construction of a building at "New York, New York." Selection of the location and size of the original site within New York City was a matter committed to the discretion of the Administrator, requiring no specific approval of Congress. Similarly, the administrative determination to enlarge the site during the construction of the building was not a matter requiring specific consideration or approval by the Public Works Committees.

It is thus clear that the condemnation in this case did not require an authorization additional to and separate from the original authorization to construct the building at Foley Square. Moreover, even if a separate authorization were required for the additional land, it would come within Section 5 of the Public Buildings Act of 1959 authorizing condemnation of "additions to sites." As Judge Dimock noted (Pet. 4a), approval of the Public Works Committees is not required for such "additions to sites." Section 7 of the Act requires approval of the Committees only for an appropriation "to construct any public building or to acquire any building to be used as a public building." The Committees have, as we have noted, already approved the construction of the Foley Square building and the privately owned building taken in the present case is not "to be used as a public building."

Because the present condemnation falls squarely within the authorization granted by the Public Buildings Act of 1959, *Maiatico* v. *United States,* 302 F. 2d 880 (CA.D.C.), is of no help to petitioner. The government's argument in that case was that it has the authority to condemn an existing building for use as a government office building without recourse to the provisions of the Public Buildings Act of 1959. While the government does not believe the *Maiatico* decision is correct, it clearly has no relevance to this case.

Finally, the public purpose for the condemnation is obvious. The principal motive for the taking was

to safeguard against human injury. A secondary motive was to protect the government against liability resulting from such injuries. The Administrator "is not barred from making a common sense adjustment in the interest of all the public." *United States ex rel. T.V.A. v. Welch*, 327 U.S. 546, 554.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964